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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-62

RUSSELL L. RUNYON, et ux, *Petitioners,*

v.

MICHAEL C. McCRARY, etc., et al, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR CERTIORARI FILED JULY 10, 1975
CERTIORARI GRANTED NOVEMBER 11, 1975

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INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statute Involved	2
Statement of Facts	2
Legal Argument	6
Conclusion	15

TABLE OF CITATIONS

CASES:

The Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 836 ..... 7, 10, 15
Moose Lodge v. Irvis, 92 S.Ct. 1971 ..... 8, 12, 15
Cook v. Advertiser Co., 323 F.Supp. 1212 8
Jones v. Mayer Co., 88 S.Ct. 2186, 392 U.S. 409 .. 8, 9, 12, 14
Katzenbach v. Morgan, 86 S.Ct. 1717, 384 U.S. 641 ... 9
Burton v. Wilmington Parking Auth., 365 U.S. 715, 81 S.Ct. 856 10
Adickes v. S. H. Kress & Co., 90 S.Ct. 1598, 398 U.S. 144 (1970) 10
Norwood v. Harrison, 93 S.Ct. 2804 ..... 10, 15
Grossner v. Columbia Union, 298 F.Supp. 535 10
Browne v. Mitchell, 409 F.(2d) 593 10
Tillman v. Wheaton Recreation Assoc., 41 U.S.C.W. 4311 10
Pierce v. Society of Sisters, etc., 45 S.Ct. 571, 268 U.S. 510 ..... 11, 15
Wisconsin v. Yoder, 92 S.Ct. 1526 ..... 12, 15
Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 29 ALR 1146 ..... 12, 13
Griswold v. Conn., 85 S.Ct. 1678, 381 U.S. 479 (1965) 12
Olmstead v. U.S., 48 S.Ct. 564, 277 U.S. 438 13
McCrary v. Runyon, 363 F.Supp. 1200 14
Gilmore v. City of Montgomery, 417 U.S. 556 14

	Page
MISCELLANEOUS:	
28 U.S.C. § 1254(1)	1
42 U.S.C.A. § 1981	2, 5, 6, 8, 9, 10, 12, 14
42 U.S.C. § 2000a	2
28 U.S.C. § 2403	5
42 U.S.C. § 1982	9
Civil Rights Act of 1866	6, 7, 8
Civil Rights Act of 1870	6, 7, 8
Thirteenth Amendment	6, 7, 9
Fourteenth Amendment	6, 7, 9, 10, 12, 13
Cong. Globe, 39th Cong., 1st Sess. 409 (1866)	6
Gressman, Civil Rights Legislation	7
Fifth Amendment	10
Tenth Amendment	10-11
First Amendment	2, 12
Ninth Amendment	12

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PETITIONER'S BRIEF

OPINIONS BELOW

The U.S. District Court Memorandum Opinion and the U.S. Court of Appeals (515 F.(2d) 1082), are part of the Appendix of the Petition for Certiorari, as Exhibits B and C, respectively.

JURISDICTION

Jurisdiction is invoked under Title 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

I 42 U.S.C.A. § 1981 Has No Application To Private Conduct. Congress Never Intended To Infringe On Private Acts. The Contract Clause of § 1981 Does Not Prohibit Private Discrimination.

II The Right of Parents and Private Schools To Freedom of Choice As To Admission Policies and Private School Selection Is A Constitutionally Protected Right By Virtue of the First Amendment.

III 42 U.S.C.A. § 1981 As Interpreted By the Court Is Unconstitutional, Class Legislation, Or Unconstitutionally Applied. It Is Beyond the Power of Congress To Legislate Against Purely Private Conduct.

STATUTES INVOLVED

42 U.S.C.A. § 1981 (Appendix Exhibit A of the Petition for Writ of Certiorari).

STATEMENT OF FACTS

The following, in brief, is a review of the material facts involved:

A joint action for injunctive relief and damages was brought against Russell L. Runyon and Katheryne E. Runyon, d/b/a Bobbe's Private School, on behalf of Michael McCrary, an infant, by his parents, and Colin M. Gonzales, an infant, by his parents. The complaint, initially, was based on alleged violations of Civil Rights Statutes Act of 1866 (42 U.S.C. § 1981) and Civil Rights Act of 1964 (42 U.S.C. § 2000a), alleging discrimination against the Negro or non-Caucasian race in its admission policies.

Bobbe's filed its responsive pleadings, including appropriate motions.

A similar suit was filed against the Fairfax-Brewster School, Inc., on identical grounds.

The two cases were consolidated for trial. The Southern Independent School Association was allowed to intervene.

Bobbe's School is an independent private school, located in Arlington County, Virginia, an area that maintains a very fine public school system. It is a small school with an enrollment of approximately 155 children. It was founded in 1958 by Mrs. Runyon. It provides a nursery, pre-kindergarten, kindergarten, first and second grade programs.

Admission to the private school requires a formal application, personal interview, physical examination, and registration fee.

The trial was held in the U.S. District Court for the Eastern District of Virginia, Alexandria Division, the Honorable Judge Albert V. Bryan, Jr., presiding.

The plaintiffs introduced evidence on their behalf and insofar as it deals with Bobbe's School, Mr. Gonzales testified that he had formally applied to Fairfax-Brewster in 1969, for his young son's admission, which was eventually denied. He subsequently made one phone call to Bobbe's School, and inquired about its admission policies.

He stated he was informed about the formal application requirements. That he inquired about its integration policy and upon allegedly being told that it was not integrated, did nothing further. This was the only

time he ever called or had any contact with Bobbe's, and although he was advised of the need to make formal application, he never did. Mrs. Gonzales corroborated her husband, admitted she never called or had any contact with the school. Mr. and Mrs. Gonzales further related they neither informed their young son about Bobbe's School, nor discussed any of the conversation with him. That the youngster was well adjusted, was immediately placed in another private school, Congressional, thereafter to a Catholic school, and finally a public school, losing no time from school. Mr. Gonzales further admitted he did not identify himself and did not tell the person he was talking to that he was black. That was in 1969, he brought suit in 1972.

Mrs. McCrary testified, insofar as is material, that sometime in 1972 she called Bobbe's School. She inquired about its admission and integration policy. That her son was 2 years old. That she was advised about the need for formal application. She further said she made no formal application after allegedly being told blacks were not admitted. Mr. McCrary testified he was in the room when his wife called. He never called or talked to anyone at the school. That no formal application was ever made. That they never told their young son about the call. This one phone call was the only contact ever made.

Two other witnesses were produced to testify regarding the alleged exclusion of blacks.

Mr. Gates testified on behalf of Bobbe's Private School. That he was superintendent of the school in 1969 and 1972. That he could not recall any calls from either party. He testified as to the type of school Bobbe's was, and to its admission policies. That the school

was integrated. That all applicants were treated alike, requiring formal application, interview, and a medical certificate. That the school was selective, that whites had been rejected. No one was accepted on the basis of a phone call, and no black had ever applied.

It was stipulated by the parties that Mrs. Runyon, the founder, would testify in corroboration of Mr. Gates' testimony.

Counsel for the McCrarys and Gonzaleses waived and dismissed any claims under any Civil Rights Act except 42 U.S.C. § 1981. They further stipulated that Bobbe's was a private school, with no state involvement, and was not supported, in any way, by local, state, or federal funds or assistance. It existed entirely on funds derived from its students.

The district court, at the conclusion of the presentation of all the evidence, and after hearing argument, took the case under advisement. It rendered a memorandum opinion and judgment order.

On appeal the judgment was affirmed in part and reversed in part by a divided court, in a 4-3 opinion.

The constitutionality of an Act of Congress is being questioned, therefore, 28 U.S.C. § 2403 is applicable. The U.S. Solicitor General has been served with copies of the petition for writ of certiorari.

LEGAL ARGUMENT

I

42 U.S.C.A. § 1981 Has No Application to Private Conduct. Congress Never Intended To Infringe on Private Acts. The Contract Clause of § 1981 Does Not Prohibit Private Discrimination.

The determination by the trial court and by the majority of the court of appeals, that § 1981 reached private conduct (private schools), is clearly erroneous.

42 U.S.C.A. § 1981 provides in pertinent part that:

> "All persons within the jurisdiction of the United States shall have the same right to make and enforce contracts . . . as is enjoyed by white citizens . . ."

Section 1981 came into being as a direct result of the reconstruction era attempts to legislate in the field of Civil Rights. It thus owes its existence to the Civil Rights Act of 1866, 1870, and the Thirteenth and Fourteenth Amendments.

The Thirteenth Amendment came into being to abolish slavery and involuntary servitude in all the states. Problems in achieving its desired effects brought about the Civil Rights Act of 1866.

The Civil Rights Act of 1866 was viewed by many as an infringement upon the state's power over contracts and property. Concern over the constitutionality of the 1866 Act and the Thirteenth Amendment brought about the Fourteenth Amendment. The Thirteenth Amendment had as its purpose the elimination of any form of slavery and involuntary servitude. The Congressional Record of the debates clearly attests to this. [Cong. Globe, 39th Cong., 1st Sess. 409 (1866.)] The Equal

Rights Amendment, commonly known as the Fourteenth Amendment, thus came into being. As a matter of fact, the provisions of the 1866 Act were meant to be incorporated into the Fourteenth Amendment. [Gressman, *Civil Rights Legislation,* at p. 1329.] Due to concern over the legality and constitutionality of the Thirteenth Amendment and the Civil Rights Act of 1866, the Civil Rights Act of 1870 was enacted. This Act, coming after the Fourteenth Amendment, reenacted the entire Civil Rights Act of 1866. [S. 810, 41st Cong., 2d Sess. (1870).]

The Fourteenth Amendment struck at any state action directed against deprivation of civil rights.

The U.S. Supreme Court in 1883 clearly decided that private discriminatory acts were not prohibited by the Constitution. [*The Civil Rights Cases*, 109 U.S. 3.]

The Honorable Justice Bradley at 109 U.S. p. 30, held, in part:

> "We must not forget that the province and scope of the Thirteenth and Fourteenth Amendments are different: the former simply abolished slavery; the latter prohibited the states from abridging the privileges or immunities of the United States . . ."

and at p. 21 (id.):

> "Individual invasion of individual rights is not the subject matter of the amendment . . . and it does not invest Congress with power to legislate over subjects which are within the domain of state legislation . . ."

and at p. 22 (id.):

> "... Take the subject of contracts, for example. The Constitution prohibited the states from passing any law impairing contracts. *This did not give to Congress power to provide laws for the general enforcement of contracts ...*"

and at p. 25, in alluding to the Civil Rights Bills of 1866 and 1870:

> "... This law is clearly corrective in its character ... intended to furnish redress against state action ..."

and goes on to say that individual wrongs unaided by state action are private wrongs and do not come under civil rights protected by the Constitution.

In the case at bar, it was conceded that Bobbe's is a private institution, operated on private property, by private owners with private funds, and attended by children of parents who, in the exercise of their freedom of choice, placed them in such a school. There is no constitutional right to a private school education. Concomitantly it would seem, a private school, like a private club, should have the same right to discriminate. As this Honorable Court said in *Moose Lodge* v. *Irvis*, 92 S.Ct. 1971 (citing the Civil Rights Cases), the Constitution erects no shield against private conduct, however discriminatory.

A federal court, in the case of *Cook* v. *Advertiser Co.*, 323 F.Supp. 1212, discussed in detail the purpose and rationale of § 1981. It pointed out the historical background of § 1981, alluded to the *Jones* v. *Mayer Co.* case (88 S.Ct. 2186, 392 U.S. 409), and concluded, after some very perceptive analysis and review of the Congressional debates on this provision, that it was intended to apply to state action only. The Fourteenth

Amendment certainly was tied in to state action (*Katzenbach* v. *Morgan*, 86 S.Ct. 1717, 384 U.S. 641).

Jones v. *Mayer* (392 U.S. 409) seems to be the bedrock regarding private discrimination. First, it should be pointed out that this case dealt with the right to purchase real estate, a non-exclusive commercial transaction. Certainly this relationship cannot be compared to a private education relationship, that is highly personal. Like a contract of marriage, can it be seriously argued that § 1981 demands the acceptance of a request to enter into matrimony, against the wishes of the other party? It may sound absurd, but if it can be seriously contended that § 1981 gives an unabridged contractual right, even absent mutuality, then a refusal could bring into play § 1981.

At this point, it should be noted that the dissent in *Jones* v. *Mayer*, by the Honorable Justices Harlan and White, delve into the historical background, rejecting the view that private discrimination absent state action is constitutionally prohibited. This opinion, alluding to the history of the sections 1982 and 1981, the Thirteenth Amendment, the Congressional debates, the Civil Rights Cases, the prior legal precedent, the Fourteenth Amendment, all point out the need for state action. It would appear then, to interpret § 1981 as the lower courts did, is tantamount to acting in a legislative and philosophical capacity.

The effect of such a decision would, for all practical purposes, eliminate the private school's status, and thus turn them into *de facto* public schools.

It would be presumptuous and needless to cite all the authorities dealing with the Thirteenth and Fourteenth Amendments and the need for public as against

private discrimination. In all the cases decided dealing with civil rights, that this writer has read, it s apparent that they dealt with non-private establishments and substantial state involvement. (See *Burton* v. *Wilmington Parking Auth.*, 365 U.S. 715, 81 S.Ct. 856. Also *Adickes* v. *S. H. Kress & Co.*, 90 S.Ct. 1598, 398 U.S. 144 [1970].)

It is submitted that § 1981 does not and could not reach private conduct. *Norwood* v. *Harrison*, 93 S.Ct. 2804, in striking down a state law, in essence held that private schools have a right to exist and operate, and absent state involvement a purely private school can have discriminatory policies and not be in violation of the Constitution. *Grossner* v. *Columbia Union*, 298 F. Supp. 535; *Browne* v. *Mitchell*, 409 F.(2d) 593.)

In *Tillman* v. *Wheaton Recreation Assoc.* (41 U.S. C.W. 4311), this court specifically held that the case did not involve a private club. And in *Burton* v. *Wilmington Parking Auth.*, 365 U.S. 725, this court again held that private conduct abridging constitutional rights does not violate the Fifth or Fourteenth Amendments absent significant state involvement.

Absent any state action, Congress is not invested with any power to enact rules for the conduct of individuals toward each other. For, as this Honorable Court pointed out in the *Civil Rights Cases*, 22 S.Ct. at pp. 33, 34:

> "If such legislation is appropriate for enforcing the prohibition of the amendment, it is difficult to see where it is to stop. Why may not Congress with equal show of authority, enact a code of laws for the enforcement and vindication of all rights of life, liberty and property? . . . The assumption is certainly unsound. It is repugnant to the Tenth

> Amendment of the Constitution, which declares that powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people."

The right of a private school to select its pupils is equated to the right of a person to choose whom he wishes to associate with. It in no way is related to slavery or to equal protection. It's a private right and should be kept that way. If not, then, where does it stop? In the case at bar, the evidence was clear, and unrebutted, that Bobbe's School has selective and exclusive standards for admission, thus outside the scope of any decided precedent.

II

The Right of Parents and Private Schools to Freedom of Choice as to Admission Policies and Private School Selection Is a Constitutionally Protected Right by Virtue of the First Amendment.

A public school education is certainly clothed with a public interest and is constitutionally protected. Therefore discrimination in any form cannot be tolerated in this area. Every child has a right, within limits, to a public school education.

However, there is no right, civil or constitutional, to demand a private school education. It has been decided, by this court, that the task of educating is a parent's right, by virtue of the First Amendment to the Constitution, expressing itself in a freedom of choice and association.

In *Pierce* v. *Society of Sisters, etc.* (45 S.Ct. 571, 268 U.S. 510), this court, in affirming the enjoining of the enforcement of an Oregon state compulsory educa-

tion law, held that the parents have the right to direct the upbringing and education of their children and that they could not be forced into a public school education as against the wishes of the parents to enter them in a suitable private school.

And in *Wisconsin* v. *Yoder,* 92 S.Ct. 1526, this court again upheld the First and Fourteenth Amendment rights of parents to rear and educate their children, subject, of course, to reasonable regulation to promote health, safety, and general welfare. (See also *Meyer* v. *Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 29 ALR 1146.)

Thus, it would seem, the right protected by the Constitution does not include the right, by use of the "contract" clause, to demand a private school education, absent concurrence by the private school.

The need for a balancing of constitutional interests is rather apparent, and the right to contract that is alluded to in § 1981 should not be interpreted to deprive and eliminate friendship, association, personal relationships, freedom of choice, and selectivity.

This then could reconcile the result of the *Jones* v. *Mayer* case and the *Moose Lodge* v. *Irvis* case. In addition, it preserves the right to privacy, freedom of choice, and liberty, as meant to be in a free society.

In *Griswold* v. *Conn.,* 85 S.Ct. 1678, 381 U.S. 479 (1965), this court, in striking down a Connecticut law, came down hard in favor of the right of privacy, as being a basic, fundamental and protected right.

It alluded to the right of association, the right to educate a child in a school of the parents' choice, whether public or private. Freedom to teach, to express ideas. And at p. 1681, id., the court quoted from the Ninth Amendment provision as follows!

> "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

In *Meyer* v. *Nebraska,* 262 U.S. 390, 399, 43 S.Ct. 625, 626, 627, this court viewed the guarantee of the Fourteenth Amendment, although not definable in precise detail,

> ". . . Without doubt, it denotes not merely freedom of bodily restraint but also (for example) the right to marry, establish a home and bring up children."

Also it could have said this right to choose for their children any school of their choice, for any reason, includes a private school with discriminatory policies. Armed with that right, then certainly, by changing the standards set by that school, it in effect deprives the parents of that right.

There are ample public and private schools open to any pupil, of any race, creed, or religion, for any parent subscribing to any philosophy.

Mr. Justice Brandeis in his dissent in *Olmstead* v. *U.S.,* 48 S.Ct. 564, 572, 277 U.S. 438, put his finger on it as follows:

> ". . . The makers of our constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. . . . They conferred, as against the government, *the right to be let alone*—the most comprehensive of rights and the right most valued by civilized men."

III

42 U.S.C.A. § 1981 as Interpreted by the Court is Unconstitutional, Class Legislation, or Unconstitutionally Applied. It Is Beyond the Power of Congress to Legislate Against Purely Private Conduct.

Our Constitution has been referred to as the greatest instrument ever, for a democratic form of government. Its very purpose is to guarantee every person equal rights, and cannot be reserved to apply to special groups or special interests or classes.

This Honorable Court in the *Civil Rights Cases* (id.), held that Congress did not have the power to provide laws for the general enforcement of contracts. The court further pointed out that class legislation is prohibited. The Civil Rights Act itself deals with public accommodations and not, since it could not, deal with private establishments.

The district court, in its opinion decided that § 1981 only restricts whites and has no application to any other race. (See footnote district court's opinion, 363 F.Supp. 1200, at p. 1204.) As the dissent ably points out in *McCrary* v. *Runyon*, No. 73-2348 U.S.C.A. 4th Cir., at p. 33, that this certainly is an unconstitutional application of the statute, assuming it is constitutional.

Constitutional amendments and federal statutes dealing with race and color cannot be interpreted to discriminate in favor of Negroes, but to prevent discrimination, and then in areas that the lawmakers have power to legislate.

The dissent in *Jones* v. *Mayer* (id.), and *McCrary* v. *Runyon*, point up the constitutional infirmities of this section. (See also *Gilmore* v. *City of Montgomery*, 417 U.S. 556.)

And again, citing the *Civil Rights Cases*, 20 S.Ct. at p. 21, that the legislative power of Congress is not invested with the power to create a code of municipal laws for the regulation of private rights.

CONCLUSION

The Constitution of the United States was never meant to apply to private conduct. It cannot be used as a sword to deprive individuals of individual rights, such as freedom of choice, of association, of expression, the right of privacy, or the right of a private school to be selective.

Certainly the reasoning in *Pierce, Yoder, Moose Lodge*, should apply with equal force to private schools. As the Honorable Justice Douglas said in *Moose Lodge*, people do have a right to band together with whomever they please. This is a private right. And finally, as this Honorable Court said in *Norwood* v. *Harrison*:

> "Such private bias is not barred by the Constitution, nor does it invoke any sanction of the laws, but neither can it call on the Constitution for material aid from the state." 413 U.S. 455, 469.

The majority opinion of the Court of Appeals should be reversed and the case dismissed.

Respectfully submitted,

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